

Cooper



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Engineered Air Systems, Inc.

File: B-237214

Date: January 25, 1990

DIGEST

1. Agency's decision not to waive first article testing requirement for protester, a current producer of the item being procured, was reasonable where the technical data package for the item had changed, the agency anticipated preproduction evaluation changes, and there were quality problems with protester's current production.
2. Contention that awardee that submitted Certificate of Procurement Integrity with its initial proposal failed to comply with requirement that Certificate be provided as close as practicable to award is denied where awardee submitted additional Certificate after award covering the period between its initial proposal and award, performance of the protested contract has been suspended pending resolution of the protest, and statutory requirement for submission of Certificate has been suspended.

DECISION

Engineered Air Systems, Inc. (EASI), protests the award of a contract to Reco Industries, Inc., under request for proposals (RFP) No. DAAA09-88-R-1055, issued by the U.S. Army Armament, Munitions and Chemical Command, for decontamination units. EASI alleges that the Army arbitrarily made award to other than the lowest priced, technically acceptable, responsible offeror because it did not waive the first article testing requirement for EASI, did not conduct meaningful discussions, changed the evaluation criteria, and failed to require Reco to submit a Procurement Integrity Certificate immediately prior to award.

We deny the protest.

The solicitation was issued as a small business set-aside on April 26, 1989, for 581 lightweight decontamination units. The RFP informed offerors that a first article

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approval test was required and asked offerors to submit prices with and without first article testing. However, the Army reserved the right to waive first article test requirements in the event award was made to a current or prior producer of articles identical or similar to those required by the solicitation, but cautioned prior producers not to assume that first article testing would be waived since prior producers could still be subject to a renewed first article requirement in certain circumstances. These circumstances, which were identical to those listed in Federal Acquisition Regulation (FAR) § 9.303(b), were outlined in the RFP's instructions for submission of first articles. Specifically, the RFP further instructed prior producers to submit prices on a first article basis, so that they would not be precluded from consideration for award in the event that the Army determined that it would be in the best interest of the government to require first article testing.

Amendment No. 1, issued on June 30, incorporated into the RFP the Certificate of Procurement Integrity clause, FAR § 52.203-8, as required by FAR § 3.104-10. This clause implemented section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988 (OFPP Act), Pub. L. No. 100-679, 101 Stat. 4055, 4064 (1988), which essentially provides that an agency shall not award a contract unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the OFPP Act pertaining to the procurement. The activities prohibited by the Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information. Under FAR § 52.203-8, offerors are required to list all violations or possible violations of the Act, or enter "None" if none exists, on the Procurement Integrity Certificate and sign the document.

The Army received proposals from five offerors by the August 4 closing date for initial offers. All offerors were considered to be in the competitive range and all submitted best and final offers by the September 21 closing date. EASI submitted the lowest price contingent on first article waiver. Keco offered the lowest price with first article testing.

With respect to the Certificate of Procurement Integrity, the contracting officer requested offerors to submit the certificates by August 4. Keco furnished its signed certificate with its initial offer on July 28. Keco later submitted two additional certificates after award.

The Army determined that it would not be in the government's best interest to waive first article testing for EASI and awarded a contract to Keco on September 22. EASI protested the award to Keco to our Office on September 29, arguing that the Army improperly determined not to waive first article testing for EASI; that the RFP should have been amended to delete the waiver clause; that the Army did not follow the evaluation criteria in the RFP; and that meaningful discussions were not conducted. EASI also alleges that the Certificate of Procurement Integrity furnished by Keco dated July 28 does not cover the period between initial offers and award, and that since 45 days had elapsed in that period, the certificate was not obtained as close as practicable to award. The Army has suspended performance of the contract.

EASI first challenges the Army's refusal to waive first article testing for EASI. EASI maintains that it is currently producing the same decontamination units for the Army under another contract and that because the solicitation itself indicated that EASI had successfully produced the same item, EASI was led to believe that the Army would waive first article testing for EASI and evaluate only its offer based on first article waiver.

An agency decision to waive or not to waive first article testing for a particular offeror is subject to question only where it is shown to be unreasonable. Honeycomb Co. of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579. Because the waiver clause does not confer upon offerors any right to a waiver and first article testing is for the protection and benefit of the government, we have generally been more demanding in our assessment of challenges to the denial of a waiver and have utilized a more stringent standard under which we will not question a determination not to waive first article testing absent bad faith, fraud or a clear showing of an abuse of discretion. Comdyne I, Inc., B-232574, Dec. 21, 1988, 88-2 CPD ¶ 611. FAR § 9.303 further states that first article testing may be appropriate where a contractor has not previously furnished a product to the government, or where the product acquired under a previous contract developed a problem during its life, was not produced for an extended period of time, or subsequent changes in processes or specifications for the product have been made.

In our view, the Army's decision not to waive first article testing for EASI was reasonable. The record demonstrates that the Army acknowledged that EASI was currently producing decontamination units, but determined that the technical

data package for the unit had changed, citing the fact that quality assurance provisions had been added, and that inspection and test requirements had been included in the specifications. The Army also anticipated preproduction evaluation changes, as outlined in the solicitation, to allow for alternate manufacturing or fabrication techniques or materials for minimization of cost or resources and maximization of output, and intended to examine the effect of these changes through a first article test. In addition, the Army asserts that EASI has had continuous quality problems under its current Army contract for the decontamination units.

In support of its position, EASI relies on the following statement in the preproduction evaluation section of the RFP:

"The technical data package for the M17 Lightweight Decontamination System was recently established for competitive procurement and production. As part of the acceptance of the package, a 100 percent dimensional inspection between the fabricated part and the drawing was successfully accomplished. This was accomplished through the items developer using his preferred manufacturing/fabrication techniques on an accelerated basis."

EASI's argument that this statement reasonably led it to believe that the Army would waive first article testing for the firm is not persuasive. The statement was contained in a paragraph which stressed the potential for changes in the technical data package and warned offerors that a preproduction evaluation would be performed. In addition, the RFP repeatedly warned offerors that had previously furnished decontamination units to the Army that they should submit prices with first article testing in case the Army decided not to waive first article testing.

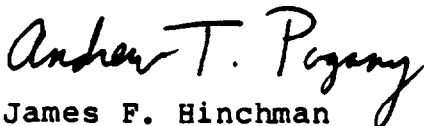
Accordingly, we conclude that the Army followed the evaluation criteria in the RFP and that the RFP adequately advised offerors that denial of first article waiver was a possibility in this procurement. As a result, the Army was not required to either amend the evaluation criteria to indicate that first article would not be waived or to conduct discussions with EASI relating to the first article waiver issue, since EASI's offer included a price with first article testing and its proposal was not deficient in any way. See FAR §§ 15.606, 15.610; Automation Mgmt. Consultants, Inc., B-231540, Aug. 12, 1988, 88-2 CPD ¶ 145.

With respect to EASI's allegation concerning Keco's Procurement Integrity Certificate, FAR § 3.104-9(b)(2)(iv) requires such certificates for RFPs to be submitted by the successful offeror as close as practicable to, but no later than, contract award. EASI argues that the Army and Keco failed to comply with this requirement because Keco's certificate was included with its initial offer and therefore was not submitted as close as practicable to award.

Effective December 1, 1989, section 27 of the OFPP Act, which imposes the certification requirement, was suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, Stat. ____ (1989), which provides that section 27 "shall have no force or effect during the period beginning on the day after the date of enactment of this Act and ending one year after such day." Accordingly, agencies are not to include the Certificate of Procurement Integrity clauses at FAR §§ 52.203-8, 52.203-9, 52.203-10 and 52.327-9 in any solicitation issued on or after December 1, 1989, through November 30, 1990. The FAR provisions affected by the suspension were changed to provide that agencies are to amend solicitations issued prior to December 1, 1989, for which bids have not been opened or proposals received before that date, to delete the certificate provision and clauses. In the case of solicitations for which bids have been opened or offers received prior to December 1, 1989, but where award has not been made, agencies are to disregard the lack of a certificate in determining eligibility for award and delete the certificate clauses by administrative change. 54 Fed. Reg. 50,713 (1989).

Here, Keco submitted one certificate with its initial offer and two after award. In light of the suspension of the certificate requirement, we do not view the lapse of time between submission of the initial certificate and award to be material, particularly where a proper certificate has been obtained, and contract performance has been suspended. Thus, we find no basis to disturb the award. See Hampton Roads Leasing, Inc., B-236564 et al., Dec. 11, 1989, 68 Comp. Gen. ____, 89-2 CPD ¶ ____; Westmont Indus., B-237289, Jan. 5, 1990, 90-1 CPD ¶ ____.

The protest is denied.

for 
James F. Hinchman
General Counsel